

That the

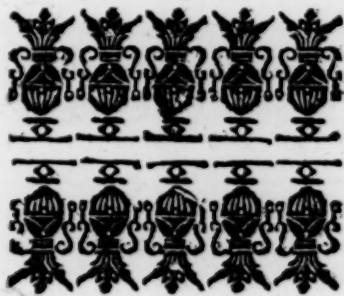
HOPS IN ENGLAND

May and Ought to Vote in
Cases of Blood.

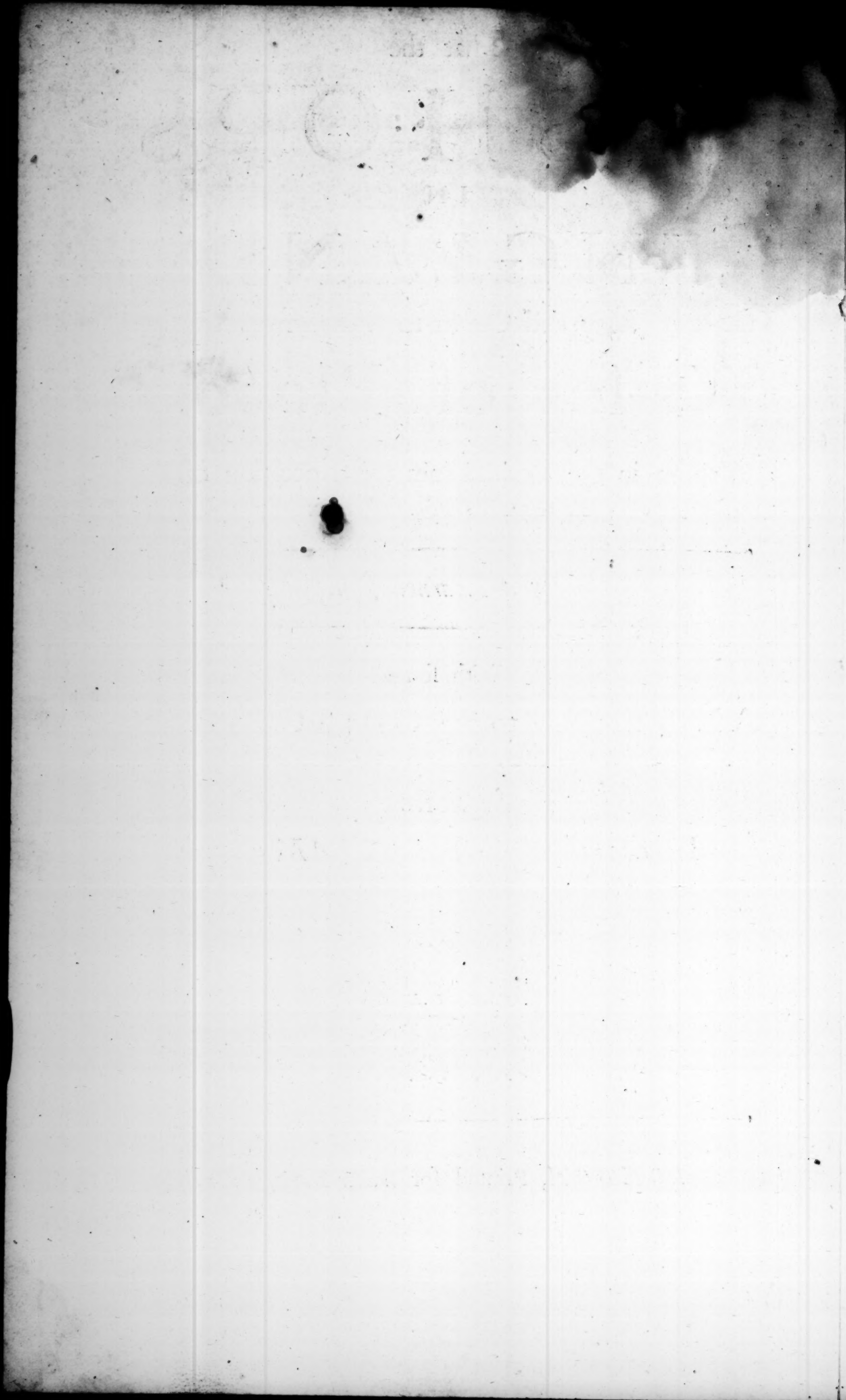
Written in the Late Times upon occasion of the
Earl of *Straffords* Case.

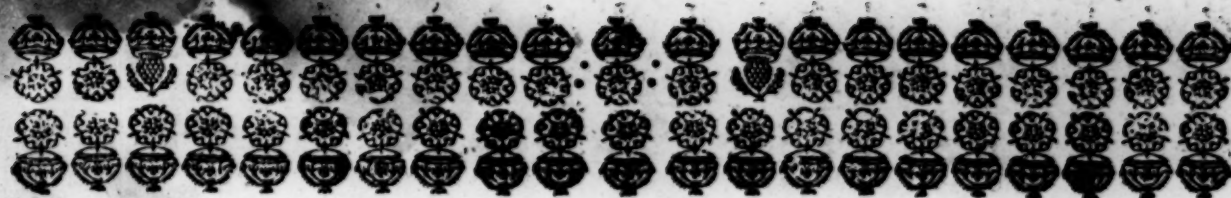
By a Learned Pen.

With some
ANSWERS to the OBJECTIONS
of the then Bishop of *Lincoln*,
AGAINST
Bishops Voting in *PARLIAMENT*.



LONDON, Printed for *Walter Davis*, 1680.





TO THE
READER.

Reader,




His Discourse was Written by a Learned Gentleman of the Long-Robe, at the beginning of the late troubles in the Case of the Earl of Strafford, but never Printed.

The same Question being started afresh, and the consideration of it revived upon the like Occasion, it is thought fit to be Published now.

If it minister any satisfaction to the Reader in the Case the Publisher has his end.

That Bishops in England may and ought to Vote in *Causa Sanguinis*, and that they were never Inhibited by any Law of this Land, or the Lay-Peers so to do, before this time, and that their voluntary forbearance heretofore to sentence in this Case, proceeded from their own Fears of the Canons and Court of Rome, and some private ends they then had. And by the special leave of the King, and both Houses in plain Parliament, who were graciously pleased to allow of their Protestations for their Indemnity, as Church-men, when they might have rejected their said Protestations if they had pleased. With some Answers to the Objections of the Bishop of Lincoln.

1.  It is not *Prohibitum quia malum*, nor any way evil in it self, no more than it is an evil thing in it self to do Justice.

2. It was in use before the Law, when the eldest of the Family was King, Priest, and Prophet.

3. It was in use under the Law, and so continued in the Priests and Levites, down to *Annas* and *Caiphas*. Nay after the Death of Christ, as appears by the Scourging of the Apostles, the Stoning of *Stephen*, the directing of *St. Paul* to be smitten on the mouth, &c.

It was in use in the persons of the Apostles themselves, as in that Judgment given upon *Ananias* and *Saphira*, in the first of the *Acts*; In the Tradition to Sathan, as most of the Antient Fathers expound that Censure; And generally in all the Word of God there is no one Text that Inhibits Church-men, more than Lay-men, to use this kind of Judicature. For that Precept to be no Striker, *1 Tim. 3. 3.* is no more to be appropriated unto a Bishop from the rest of Christian men, than that, *not given to Wine or Roaring* which immediately precedes the same.

In this Island it was in use before the Romans entered the same, when the Druids, *Si cedes facta, pœnas constituunt*, gave all Sentences in Causes of Blood. *Cæs. de bello Gallico lib. 6.* see Mr. Selden's *Epinomis Cap. 2.*

Nor is it like the Romans should forbid it in Church-men, whose Pontifical Colledge, after the entertaining of the 12 Tables, medled in all matters of this kind, *Strabo Geograph. lib. 4.*

And it is not like, that the Christian Religion excluded Bishops in this Island from Secular Judicatures, considering that King *Lucius* is directed by the advice of his Council, to take out his Laws for the reigling of this Kingdom, *Ex utraque Pagina*, that is, out of the Old and New Testament, which could not be done in that Age, without the help of his Bishops. See Sir Hen. Spelmans Councils, pag. 34. *ad Annum Domini 185.* And how the great Prelates amongst the Antient Britains were wholly employed in these kind of Secular Agitations, you may see by the Ecclesiastical Laws of

Howel Dha, set forth by Sir Henry Spelman in his Councils, pag. 408. *ad Annum Domini*. 940.

4. And a little before this *Howel Dha*, lived King *Æthelstan*. In the 2^d Cap. of whose Ecclesiastical Laws we have it peremptorily set down, *hinc debent Episcopi cum seculi Judicibus interesse judiciis*, and particularly in all Judgments of the Ordals, which no man that understandeth the word, can make any doubt to have been extended to the mutilation of Humane members. Sir Henry Spelman's Councils, pag. 405. *ad Annum Domini*, 928.

5. And that the Bishops joyned alwayes with the Secular Lords in all these Judiciary Laws, and Acts, under the whole Reign of the Saxons and Danes within this Island, we may see by those Saxon and Danish Laws (or rather Capitularies, which amongst the French and Germans, do signifie a mixture of Laws, made by the Prince, the Bishops, and the Barons, to reigle both Church and Common-wealth) set forth by Mr. Lambert, Anno 1568. see particularly the 9th Chap. of King Edwards Laws, *de his qui ad iudicium ferri vel aque judicati sunt per Justitiam Regis*. It is in Mr. Lamberts Laws, fol. 128.

And thus it continued in this Kingdom long after the Conquest, to wit in Henry Beauclarks time, after whose Reign it began first of all to be a little limited and restrained. For at Clarindon, Anno Dom. 1164. the 8th of the Calends of February, in the 11th year of Henry the 2. a general Record is agreed upon, by that Kings special Command, of all the Customs and Liberties of this Kingdom, ever sithence Henry the first, that Kings Grand-Father, as you may see in Matthew Paris, pag. 96. of the first Edition, where amongst other Customs agreed upon, this is one.

Arch-Bishops, Bishops, and all other Persons of this Kingdom which hold of the King *in Capite*, are to enjoy their Possessions of the King as a Baronie, and by reason thereof, are to answer before the Judges and Officers of the King, and to observe, and perform all the Kings Customs. And just as the rest of the Barons, ought (for it was a duty the King then required from them, as the King now by his Summons doth from us) to be present in the Judgments of the Kings Courts, together with the rest of the Barons, until such time as they shall there proceed, to the mangling of members or Sentence of Death.

And here, in the last words is a diversity of reading. For Matthew Paris a young Monk, that lived long after, reads this Custom thus;

Quousque perveniatur ad diminutionem membrorum vel ad mortem. Which may be wrested to the first agitation of any Charge tending that way. But *Quadrilogus* (a Book written in that very Age) and the Copy of the Articles of Clarindon which Becket sent to Rome, extant at this day in the Vatican Library, and out of the which, Baronijs in his Annals *ad Annum* 1164, transcribes it, reads the Custom thus; *Usque perveniatur in Judicio ad diminutionem membrorum, &c.* which leaves the Bishops to sit there, until the Judgement come to be pronounced, amounting to Death, or mutilation of members.

And as this was agreed to be the Custom, so was it the Practise also. After the 11th year, to wit in the 15th year of Henry the 2. At what time the Lay-Peers are so far from requiring the Bishops to withdraw, that they endeavour to force them alone, to hear and determine a matter of Treason in the Person of Becket. Stephanides is my Author for this, who was a Chaplain and follower of that Arch-Bishop. The Barons say (saith that
Author

Author) you Bishops ought to pronounce Sentence upon your selves, we are Layicks, you are Church-men, as this fellow is, being his fellow Priests and fellow Bishops: To whom some one of the Bishops replied, this belongs rather to you my Lords, than to us; for this is no Ecclesiastical, but a Secular Judicature. We sit not here as Bishops, but as Barons. *Nos Barones & vos Barones hic pares sumus*, We Barons and you Barons, are all Peers in this place. And in vain it is, that you should labour to find any difference at all in our Order or Calling, &c. see this M. S. cited by Mr. Seldens Titles of honour, the 2d Edition, pag. 705. And thus the Custom continued until the 21 year of the same King Henry 2, at what time that Provincial Synod was kept at *Westminster* by the Arch-Bishop of *Canterbury*, and some few of his Suffragans, which *Roger Hoveden* mentions in his History, pag. 543. And (it seems) *Gervasius Dorobernensis* which is a M. S. I have not seen. The quoting of this Monk in the Margen of that Collection of Priviledges which Mr. Selden by Command had made for the upper House of Parliament, is the only ground of stirring up this question against the Bishops, at this present intended by Mr. Selden for a Priviledge for Bishops, not for a Priviledge for the Lay-Peers, to be pressed against Bishops. The Canon runs thus.

It is not Lawful for such as are Constituted in Holy Orders, *Indicium Sanguinis agitare*, to put in Execution Judgments of Blood; And therefore we forbid, that they shall either in their own Persons, Execute any such mutilation of Members, or Sentence them to be so acted by others. And if any such Person, shall do any such thing, he shall be deprived of the Office and Place of his Order and Function. We do likewise forbid under the peril of Excommunication, that no Priest be a Secular Sherif or Provost.

Now this is no Canon made in *England*, much less Confirmed by Common Law, or assented unto by all the Bishops of the Province of *Canterbury*, or by any one of the Province of *York*, but Transcribed (as appears by *Hovedens* Margen) out of a Council of *Toledo*; which in the time That Council is supposed to be held (to wit the year of our Lord 660) was the least Kingdom in *Spain*, and not so big as *Yorkshire*, and consequently improper to reigle all the World, and especially this remote Kingdom of *England*. Besides, that as this poor Monk sets it down, it doth Inhibit Church-men from being Hang-men, rather than from being Judges, or at the most, from being Judges to Condemn men, to be thus mutilated and mangled in their Members. An ordinary punishment of the *Goths* and *Vandals*, who then lived in *Spain*, but never heard of here with us, of many years before the Reign of *Henry* 2d. And therefore not fitly pressed to drive Bishops from sitting as Peers in the Case of the Earl of *Strafford*, who was not to be Sentenced to any mutilation of Members. True it is, that in the Council it self, being the 11th Council of *Toledo*, and the 6th Canon, they are forbidden, *quod morte plectendum est, Sententia propria judicare*, to Sentence in any Cause, that is to be punished by Death. Whereas in the 4th Council of *Toledo* under *Sisinandus*, held not long before, *Anno Dom. 633*. Canon, 31. It is said, that the Kings do oftentimes commit to Priests and Bishops their Judicature, *contra quoslibet Majestatis obnoxios*, against all Traytors, howbeit from that time forward they are directed not to obey their King in this particular, unless they have him bound by Oath to Pardon the party, in Case they shall find Reason to mediate for him

him. And thus the Canon Law went in *Spain*, but nowhere else in Christendom, in that Age.

But these Bishops at *Westminster* travailed not so far as *Toledo*, to fetch in this Canon into their Synod, but took it out of *Gratian*, then in vogue: for he lived in the time of *Henry Beauclark*, Grand-Father to this *Henry* the 2d, who in the 2d part of his Decrees *Cap. Clericis*, saith thus, *Clericis in Sacris ordinibus constitutis, ex Concilio Toletano, iudicium sanguinis agitare non licet.* And so this Canon was fetch'd from *Spain*, into these other parts of Europe, five hundred years after the first making thereof upon this occasion.

Pope *Gregory* the 7th, otherwise called *Hildebrand*, who lived in the time of *William* the Conqueror, having so many deadly quarrels against *Henry* the 4th, Emperor of *Germany*, to make his party good and strong, laid the first ground (which his Successors in their Canons closely pursued) to draw the Bishops, and other great Prelates of *Germany*, *France*, *England* and *Spain*, from their Lay-Soveraignes, and Lay-Lords, to depend wholly upon him, and so by Colour and Pretence of Ecclesiastical Immunities, withdrew them from the Services of their Princes, in War, and Peace, and particularly from Exercising all places of Judicature in the Civil Court of Princes: To the which Offices they were by their breeding and Education more enabled, than the Martial Lay-Lords of that rough Age, and by their Fiefes and Baronies, which they held from Kings and Emperors, particularly Bound and Obliged. And therefore shall you find, that whereas the Bishops of this Island before the Conquest, did still joyn with the Kings and Elder-men or Lay-Lords, in the making and executing of all Laws whatsoever, touching deprivation of Life, or mutilation of Members; yet soon after, when the *Norman* and *English* Prelates, *Lanfranc*, *Anselm*, *Becket* and the rest, began to Trade with *Rome*, and as *Legati nati*, to Wed the Laws and Canons cryed up in *Rome*, and to plant them here in *England*, they withdrew by little and little the *English* Prelates from those employments by, and dependances upon, the Kings of *England*: And under the Colour of Exemptions, and Church Immunities, erected in this Land an Ecclesiastical Estate and Monarchie, depending wholly upon the Pope; inhibiting them to exercise Secular Employments, or to sit with the rest of the Peers, in Judicatures of Life and Member, otherwise than as they list themselves. And hence (principally) did arise those great heats, between our *Rufus* and *Anselm*, which *Edmerus* speaks of, and those Antient Customs of this Kingdom which *Henry* the 2d pressed upon *Becket*, in the Articles of *Clarendon*, that the Prelates ought to be present in the Kings Courts, &c. Which Pope *Alexander*, a notable *Bontefeu* of those times in the Church of God, did tolerate though not approve of, as he apostyles that Article with his own hand, to be shewed to this day in the M. S. extant in the *Vatican* Library. And although I shall not deny, but the Popes did pretend Scripture for this Inhibition (as they did for all things else) and allude unto that place, *2 Tim. 3.4.* which they backed with one of the Canons of the Apostles (as they call them) the 7th in Number; yet is it clear their main Authority is fetch'd from this obscure Synod of *Toledo*; where 18 Bishops only were convened under *Bamba* the Goth, who of a Plow-man was made a King, and of a King a cloistred Monk, as you may see in the History of *Rodericus Santius*, par. 2. cap. 32. This is all the goodly ground, that either *Gratian* in his Decrees, or *Innocentius* the 3d in the Decretals,
or

or *Roger Hoveden* in his History, alledge against the Ecclesiastical Peers, and their sitting as Judges in Causes of Blood; to wit this famous *Gothish* Council of *Toledo*.

The first that openly planted this Canon here in *England*, was *Stephen Langton*, a Cardinal, the Popes Creature (as his Holyness was pleased to stile him in his Bull) and thrust upon the See of *Canterbury* by a Papal Provision, where he continued in Rebellion against his Sovereign, as long as King *John* lived. This Arch-Bishop under Colour of Ecclesiastical Immunity (as this Canon is Marshall'd by *Lindwood*) at *Osney* neer *Oxford*, did Ordain, *Ne quis Clericus beneficiatus, vel in sacris ordinibus constitutus*, that no Clergy-man having a Benefice or otherwise in Holy Orders, should presume to be present in that place, *Ubi iudicium sanguinis tractatur, vel exerceatur*. And this is the first Canon Broached in this Kingdom, to this Effect. That of *Othobon* being subsequent in time, and a meer Forraign or Legatine Constitution. See it at large in *Lyndwoods Constitu. lib. 3.* at the end of the Book.

And by Vertue of a branch of this very Constitution, the now Arch-Bishop 2 years sithence, Fined the Bishop of *Glocester* in the High Commission, because he had given way (in time of Pestilence only) that a Sessions (or Judgment of Blood) might be kept in a Sacred place, which was likewise Inhibited in this Canon. But this admits of a Multitude of Answers.

1. *Quod hæc Dictio, Clericus, ex vi verbi, non comprehendit Episcopum.* This word Clerk in the Canon Law, reacheth not to a Bishop or a Peer of the Realm, saith *Lyndwood* in his third Book, *cap. de Locatis & Conductis*.

2. The Irregularity incurred by Judicature in Causes of Blood, is only *Jure positivo*, and therefore dispensable by the Pope, saith *Covarruvias in Clem. Si furiosus. Par. 2. §. 5. n^o 1.* And here in *England* it is Dispenced with in Bishops by the King, who in his Writs or Summons to the Parliament, Commands the Lords Spiritual, without any exception of Causes of Blood, to joyn in all Matters and Consultations whatsoever, with the Temporal Peers of the Kingdom, these Summons being unto them a sufficient Dispensation so to do.

And *Othobon* himself, Inhibiting other Clerks to use these Secular Judicatures, hath a *Salvo* to preserve the Priviledges of our Lord the King, whereby he may use any of their Services, in that kind; when he shall see Cause; in the Title called *Ne Clerici jurisdictionem secularem exercent*. As *Lyndwood* in his Gloss upon that Text doth instance, in the Clerks of the Chancery, and others. Nor are these Writs of the Bishops Dispensations only, but Mandates also, and Bishops have been Fined at the Kings-Bench, and elsewhere, for Absenting themselves from Counsels in Parliament (as now they are required to do) without the Kings special leave and Licence first Obtained.

3. When they are forbidden *Interesse* to be present, the meaning is, not (in the very Canons themselves) that they should go out of the Room, but only that they should not be present, to add Authority, Help, or Advice, to any Sentence Pronounced against a particular individual Person, in a Cause of Blood, or mutilation of Members. If he be present *Authorizando, consilium, opem, vel operam dando*, then he Contracts an Irregularity, and not otherwise saith our *Lyndwood* out of *Innocentius*. And the Canon

reacheth no further, than to him that shall Pronounce Sentence of Death, or mutilation upon a particular Person. For Prelates that are of Council with the King, in Parliament or otherwise, being demanded the Law in such, and such a Case (without naming any individual Person) may Answer; *generaliter loquendo*; as, that Treason is to be punished with Death; and a Counterfeiter of the Kings Coyn is to be Burned, &c. Cardinal *Hosienfis*, lib. 2. cap. de fals. monet. Allowed by *John Montague*, de *Collatione Parliamentorum in Tractat. Docto.* vol. 10. pag. 121.

4. These Canons are not in Force in *England* to bind the Subjects of this Kingdom, for several reasons.

1. Because they are against his Majesties Prerogative, as you may see it clearly in the Articles of *Clarindon*, and the Writ of *Summons*; and therefore abolished by the Statute of 25^o of *Henry* the 8th. It is his Majesties Prerogative declared at *Clarindon*, that all such Ecclesiastical Peers, as hold of him by Barony, should Assist in the Kings Judicatures, until the very actual pronouncing of a Sentence of Blood. And this holdeth all along from *Henry* the first, down to the latter end of *Queen Elizabeth*, who employed Arch-Bishop *Whitgift* as a Commissioner upon the Life of a Personage, not to be named without Horror; and as the first keeper and examiner, of *Robert*, the most Noble Earl of *Essex*, after that Commotion in *London*. And to say, that this Canon is Confirmed by Common Law in this Kingdom, is a very Tale, there being nothing in all the Common Law that tends that way.

2. It hath been Voted in the House of Commons this very Sessions of Parliament, that no Canons sithence the Conquest, either Introduced from *Rome*, by Legatine Power, or made in our Synods, never had, in any Age, nor yet have at this Instant, any Power to bind the Subjects of this Realm, unless they be Confirmed by Act of Parliament. Now these Canons which Inhibit the presence of Church-men, in Causes that concern Life, and Member, were never Confirmed by any, but seem to be Impeached by diverse, and sundry Acts of Parliament.

3. The whole House of Peers have this very Session despised, and set aside this Canon Law, which some of the young Lords cry up again, in the same Session, and in the very same Cause, to take away the Votes of the Bishops, in the Case of the Earl of *Strafford*. For by the same Canon-Law, that forbids Clergy-men to Sentence, they of that Coat are more strictly Inhibited, to give Testimony in Causes of Blood. *Nec etiam potest esse Testis, vel Tabellio, in Causa Sanguinis*, saith my *Lyndwood*, fol. 146. pag. 2. For no man co-operates more to a Sentence of Death, than the Witnesses, upon whose attestation the Sentence is principally Founded, saith *Lopez*, in his *Practica Criminalis*, Cap. 98. Dist. 21. And yet have these Lords admitted as Witnesses, produced by the Commons against the Earl of *Strafford*, the Arch-Bishops of *Canterbury* and *Armache*, together with the Bishop of *London*, the which Lords now Command all Bishops to withdraw, in the Agitation of the self-same Cause. Bishops it seems may be Witnesses to kill outright, but may not sit in the Discussion of the Cause, to help (in Case of Innocency) a distressed Noble man, whereas the very *Gothish* Bishops (who first invented this exclusion of Prelates from such Judicatures) allow them to Vote, as long as there is any hope left of clearing the party, or gaining of Pardon, *Concil. Tolet. 4. can. 31*. And by the beginning of that Canon, observe the use in *Spain* in that Age
(*Anno*

(*Anno Dom.* 633) as touching this Doctrine. *Sæpe Principes contra quoslibet Majestatis obnoxios, sacerdotibus negotia sua committunt.* You shall find it in the fourth Tome of *Binius* his last Edition of the Councils, pag. 592. Lastly in the Case of Arch-Bishop Abbots, all the great Civilians, and Judges of this Kingdom, as Dr. *Steward*, Sir *Henry Martin*, the Lord Chief Justice *Hubbard*, and Judge *Doderidge* (which two last were well vers'd in the Canon Law) delivered positively, that all Irregularities introduced by Canons upon Ecclesiastical Persons concerning matters of Blood, were taken away by the Reformation of the Church of *England*: And were repugnant to the Statute of 25 of *Henry* 8. as restraining the Kings most just Prerogative, to imploy his own Subjects in such functions, and Offices, as his Predecessors had done; and to allow them those Priviledges and Recreations, as by the Laws and Customs of this Realm they had formerly enjoyed. Notwithstanding the Decree, *de Clerico venatore*, or the Constitution, *Ne Clerici secularem jurisdictionem exercent*, or any other in that kind.

The only Objection, which appears upon any Learning or Record, against Church-mens Voting in this Kingdom in Causes of Blood, are two, or three Protestations entred by the Bishops amongst the Records of the upper House of Parliament, and some few passages in the Law-Books relating thereunto. The Protestation the Lords now principally stood upon, is that of *William Courtney* Arch-Bishop of *Canterbury*, 11^o Ric. 2. inserted in the Book of Priviledges, which Mr. *Selden* Collected for the Lords of the upper House. In the Margin whereof, that passage out of *Roger Hoveden* whereof we spake before, about Clergy-mens agitation of Judgments of Blood, is unluckily inserted, and for want of due Consideration of this point, and some suspicion of partial carriage in the Bishops in the Case of the Earl of *Strafford*, hath been eagerly pressed upon the Bishops, by some of the Lords, in such an unusual, and unaccustomed manner; that if the Bishop of *Lincoln* (who offered to speak unto this Objection) had not voluntarily withdrawn himself, he, and the rest of the Bishops had been (without hearing) Voted out of the House, in the Agitation of a Splinter of that Cause, of the Earl of *Strafford*, which came not neer any matter of Blood. An Act never done before in that Honourable House, and now Executed suddenly, without the least Consideration of the merit of the Cause. The only words insisted upon in this Protestation in question, are these. Because in this present Parliament certain matters are agitated, whereat it is not Lawful for us, according to the Prescript of Holy Canons to be present. And by, and by after they say, these matters are such, in the which *nec possumus, nec debemus interesse*, we neither can nor may be present.

This is the Protestation most stood upon; for that of Arch-Bishop *Arundel*, 21 Ric. 2. (at what time the Bishops going forth, left their Proxies notwithstanding with the Lay-Lords, and consequently continued present in Judicature, in the eye and Construction of the Law) it is not so full, and ample as this of *Courtney's*. And therefore I must apply my Answers to this Protestation principally, which are diverse and fit to be weighed and understood.

First, I do observe, that Bishops never Protested or withdrew, in Cases of Blood, but under the unsteady Reign of *Richard* the Second only. Never before, never after the time, of that unfortunate King, from the Conquest

Conquest to this present Parliament, for ought appeareth in Record or History. And that one Swallow should make us such a Spring, and one Omission should create a Law or Custome, against so many Actions of the *English* Prelates, under so many Kings before, so many Kings and Queens after that young Prince, seems unto me a strange Doctrine. Especially when I consider that by the Rules of the Civil and Canon Law, a Protestation dies with the Death of him that makes it; and is Regularly vacuated, and disannulled, *Per contrarium actum subsequentem protestationem*, by any one subsequent Act, varying from the tenour of the said Protestation. *Reg. juris. Jo. Baptist. Nicolai. par. 2.* Now that you may know, how the Prelates carryed themselves in this Point, and actually voted in Causes of Treason, and sometimes to Blood, before *Richard* the 2^d. I refer me to what I cited before out of Mr. *Selden* (and he out of *Stephanides*) concerning *Thomas a Becket*, Condemned by his Peers Ecclesiastical and Temporal, about 15 of *Henry* the 2^d. Arch-Bishop *Stratford* acquitted of high Treason in Parliament, by four Prelates, four Earls, and four Barons, under *Edward* the 3^d. *Antiquitates Britanniae, pag. 223.* 4 *Edward* 3, *Roger de Mortimer*, *Berisford*, *Travers*, and others, adjudged Traytors by the Earls, Barons and Peers, 16^o *Edward* 3. *Thomas de Berkley* was acquitted of Treason, *in pleno Parlamento*, &c. And especially I refer me to that Roll of 21 *Rich.* 2, n^o. 10. & 50. Which avers that Judgments and Ordinances, in the time of that Kings Progenitors, had been avoided by the absence of the Clergy, which makes the Commons thereto pray, that the Prelates would make a Procurator, by whom they might in all Judgments of Blood, be at the least legally, if they durst not be bodily present in such Judgments. And then for the practice sithence the Reign of *Rich.* the 2^d. In the first of *Henry* the 4th, the Commons thank the Lords Spiritual and Temporal for their good and rightful Judgment in freeing the Earl of *Northumberland* from Treason. 3 of *Henry* the 5th. the Commons pray a Confirmation of the Judgment, given upon the Earl of *Cambridge*, by the Lords Spiritual and Temporal. 5 of *Henry* the 5th, Sir *John Oldcastle* is Attainted of Treason and Heresie, by the Lords Spiritual and Temporal. 28 of *Henry* the 6th. the Duke of *Suffolk* charged with Treason, before the Lords Spiritual and Temporal, 31 *Henry* the 6th. the Earl of *Devon*, and so down to the Earl of *Bristols* Case, wherein 22^o Maij. 1626. ten Bishops are joyned, with ten Earls, and ten Barons, in the disquisition and agitation of that supposed Treason. I leave it therefore to the Judgment of any indifferent man, whether these Protestations made all under one Kings Reign, and dying with the Parties that made them, can void a Right and Custome, grounded by a continual Practice to the contrary, in all other Tryals that have been sithence the Conquest, to this present Parliament.

Secondly, it is fitting we know, the Nature of a Protestation, which some peradventure may mistake, *Protestatio est animi nostri declaratio, juris acquirendi, vel conservandi, vel damnum depellendi causa facta*, saith *Sigelius*, *Calvin*, and all the Civilians. No Protestation is made by any man (in his Wits) to destroy his own Right (and much less another mans) but to acquire or preserve some Right, or to avoid and put off some Wrong, that was like to happen to the party or Parties that make the Protestation. As here in *Courtneys* Protestation, the Prelates in the first place, conceive a Right and Power they had, voluntarily to absent themselves,

selves whilst some matters were treated of, at that time in that House of Lords ; which by the Canon Law (the breach whereof the Popes of *Rome* did in those times vindicate with far more severity, than they did the transgressions of the Laws of God) they were not permitted to be present at, and all this, not for want of Right to be there in all Causes, but for honesty, and preservation of their Estates, as it is in the Act of Parliament, 11 *Rich.* 2.

In the second place they did preserve their former Right as Peers, which they still had, (though voluntarily absenting of themselves) *More solito interessendi, considerandi, tractandi, ordinandi & definiendi*, all things without exception, Acted and Executed in that Parliament.

And in the Last place, they protest, against any loss of Right, of being or Voting in Parliament, that could befall them, for this voluntary absenting of themselves at this time.

And where, in this Protestation, is there one word to prejudice their Successors, or to authorize any Peer, to Command his fellow Peer, called thither by more Antient prescription of time, and by the same Writs of Summons, that himself is, to withdraw and go out from this Common Council of the Kingdom?

Thirdly, we do not certainly know, what these matters were, whereat Arch-Bishop *Courtney* conceived the Prelates neither could, nor ought to be present. These matters are left in loose, and general words in that Protestation. Some conceive indeed, it was at the Condemnation of *Tresilian*, *Brambre*, the Lord *Beauchamp* and others. See *Antiquit. Brit.* pag. 286. But the notes of Priviledges belonging to the Lords (collected by Mr. *Selden*) do with more reason a great deal, assign this going forth of the Prelates, to be occasioned, by certain Appeals of Treason, advanced in that Parliament, by the Duke of *Glocester*, against *Alexander* Arch-Bishop of *York* ; whom the Popish Canons of those times (as you know) exempted, as a Sacred Person, from the cognisance of King or Parliament ; and therefore the rest of the Bishops as the squares went then, neither could, nor ought to be present, and parties, to break upon the Exemptions, Immunities, and Priviledges of that great Prelate. But the Earl of *Strafford* is not the Arch-Bishop, but the President of *York* ; and to challenge any such Exemptions, and Immunities from the cognisance of the King or Parliament, amounts at this time to little less than Treason, and therefore is the Protestation very unseasonably urged, to thrust out any Protestant Prelate from Voting in Parliament.

Lastly, a Protestation in the Civil or Canon Law (for the Law of this Land knoweth it not) is but a Testation or Witnessing before-hand of a mans own mind or Opinion, whereby we that Protest, provide to save, and preserve our own Right for the time to come. It concludes no man besides our selves, no Stranger to this Act, no Heir, no Successor ; but (if it be admitted) sticks, as inherent in the Singular, and individual Person, until either the Party dies, or the Protestation be withdrawn, and revoked. And therefore what is a Protestation made by *William Courtney*, to *William Laud*, or by *Thomas Arundel*, to bind *Thomas Morton* ? And what one Rule in the Common Law of the Land, in the journal Book, or in the Records of the Town, can be produced to exclude the Lords Spiritual from sitting and Voting in Causes of Blood ? They were sometimes (by the great favour of the King, the Lords, and the Commons, not o-
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therwise) permitted to absent themselves; never, before this time, Com-
manded by the Lay-Lords, to forbear their Votes, in any Cause whatso-
ever, that was agitated in Parliament. So our Law-Books say, that the
Prelates by the Canon Law may make a Procurator in Parliament when
a Peer is to be Tryed, which is enough to shew their Right thereunto,
10 *Edward* the 4th, fol. 6. B. placit. 17. And that, it is only the Canon-
Law, that inhibits them to Vote in Sanguinary Causes. *Stamford* pleas of
the Crown, fol. 59. The Canon Law, saith *Stamford*, in a distinct and
separated Notion; and therefore not grown in his Age, to any such U-
sance or Custom, as made it Common Law, or the Law of this
Land.

Objection. But the Bishop of *Lincoln* (and Bishop *Andrews* before him)
did alwayes forbear to Vote in Causes of Blood, and did voluntarily retire
out of the House, when this Cause of the Earl of *Strafford* came to any
serious Agitation. Neither putting this withdrawing of the Prelates to
any Vote, nor offering to enter any Protestation.

Answer. That Bishop had no opportunity to enter Protestations, which
you shall never find to have been offered by the Prelates, but in Plain
Parliaments, when the three Bodies are together. And his voluntary
withdrawing of himself, he may live to Repent him of, if he shall here-
after be questioned for the same, at the Kings-Bench or elsewhere. He was
called thither by his Writ (which he did not so easily Obtain) to sit, and
not to withdraw himself from Parliament, when he pleased. Besides his
extraordinary Obligations to the Lords, at this time whom he could not
offend without great suspicion of high Ingratitude. He is the first Pre-
late that ever was fetched out of the Tower, and brought to sit in Parli-
ament by the Black-Rod. And therefore we are not so much to confi-
der that Prelates Opinions, or Actions in this kind; as the reasons he
gave for the same, which (as I have heard them Rehearsed) are, to speak
modestly of them, no Demonstrations. His first and main Reason, was
that of the Record and Statute of 11 *Rich.* the 2^d. That it is the Hone-
sty of that Calling, not to intermeddle in matters of Blood. The *French*
word *Honestete*, signifies decency and Comliness; as though it were a But-
cherly and loathsome matter to be a Judge, or to do Right upon a Male-
factor, to Death or loss of Members. But this is an Imaginary decency,
never known in Nature or Scripture, (as I said before) but begotten by
Ignorance in the dark Fog and Mists of Popery. Such an Honesty of the
Clergy it was, to have a Shaven Crown, to depend upon their Holy Fa-
ther the Pope, to Plead Exemptions, and to refuse to Answer for Felo-
nies, in the Kings Courts, &c. All these Particulars were esteemed in those
dayes, the *Honestete* of the Clergy, and such an Honesty it was in the Pre-
lates of *England* in the loose Reign of *Rich.* the 2^d. to absent themselves
when they listed, from this Assembly of the Estate, contrary to the Kings
Commands in the Writs of Summons, and to the duties of their places, as
Peers of Parliament. Howbeit they shewed more Courtesie (or more
Wit at the least) than our present Prelates; for they never offered to re-
tire themselves in those dayes, before their Protestation was benignly re-
ceived, and suffered to be entred upon the Parliament Roll, by the King,
and the Lords, and the House of Commons. The Second Reason of this
Prelate, is of the same Nature, and built upon a *Medium* of Sands which
is soon undermined and washed away. That although he doubted not of
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the Legality or Comliness, of an Ecclesiastical Peer of the Kingdom of *England*, to Vote in a Judgment of Blood (as they do continually in the passing of all Appeals and Attainders in Parliament) yet because it is not the practice of Prelates in other parts of the Christian World so to do, he thought it better to avoid Scandal and the talk of other Nations. That there being in the High Courts of Parliament and Star-Chamber, Judges enough besides the Prelates, they might without any prejudice to King or Countrey, forbear Voting in these Judicatures. Somewhat the rather, because all our Bishops in *England* are Divines, and Preachers of the Gospel; and consequently, of mercy rather than of Judgment. Who never touch upon the sharpness of the Law, unless it be to prepare mens hearts to receive the Comfort of the Gospel.

But this Prelate cannot but know, that these Canons that Oppose the Kings Prerogative, are taken away in the Kingdom of *England* by the Statute of 25 *Henry* the 8th, which they are not elsewhere. And this Bishop (if he have not forgot it) was taught all this in the Case of Irregularity pursued against Arch-Bishop *Abbots*, when this Bishop fearing the Censure of the *Sorbonists* in *Paris*, refused to be Consecrated by *Abbots*; unless he the said *Abbots* would procure himself absolved from that Irregularity, which he had Contracted, in killing a man by Chance-medly, which he was enforced at the last to do, this other Prelate (being then in his rising and warm Blood, and liking better of many good Benefices, than of one mean Bishoprick) refusing stiffly to be made Bishop of *Lincoln* upon any other Condition.

*For Bishops making of Procurators in
Causes of Blood.*

IT doth not appear that Bishops ever made Protestations, or withdrew in Cases of this Nature, before the 11th, nor after the 21st of *Rich.* the 2^d.

And yet the Attainders in the 11th year, are afterwards ratified by the Consent of the Lords Spiritual, 11 *Rich.* 2. as you see by their Act of consent, *Rott.* 11 *Rich.* 2. n^o. 38. And the Printed Statutes.

And in his twenty first year they made Procurators, first, *Thomas Percy* in Writing, 21 *Rich.* 2. n^o. 9. where you have his Proxie set down in *Latine*; and then *Scrop* Earl of *Worcester*, by word of mouth. As the *Roll* is 21 *Rich.* 2. n^o. 50. where *Scrop* gives Sentence in the like Causes by vertue of that Procuration as the *Roll* saith.

And that this Proxie of the Prelates was not left with a Lay-man, for the dispatch of other Civil Causes only, but for Judgments of Blood also, it is appealed to all Histories and Law-Books, that have been Written from that time to this present day.

Thomas of *Walsingham* Lived under *Henry* the 6th, and he saith, that it was exacted of the Prelates (for it was not their own seeking,) as you may see upon the *Rolls*, that because they could not be present in Judgments of Blood, their Procurator (upon the like occasion) might assent unto such a Business, *Walsing.* in *Rich.* 2. pag. 354. So likewise in his *Hypodigma Neustria*, pag. 550.

Littleton Lived under *Edward* the 4th, and he pronounceth for himself, and all his fellow Judges; That the Lords Spiritual who cannot consent to the Death of a man, shall make a Procurator in the Parliament, before the Steward is to proceed to gather Votes, &c. The Year-Book, 10 *Ed.* the 4th, n^o. 17.

Stamford Lived under *Henry* the 8th, *Edward* the 6th, Queen *Mary*. And he saith clearly, That when a Peer is Indicted of Treason, or Felonie in Parliament, the Lords Spiritual shall make a Procurator for them. *Stam. Pleas* of the Crown, lib. 3. pag. 153.

Mr. *John Selden* Lives still, than whom (peradventure) there Lived not an abler Lawyer in both the Laws, from the 21st of *Richard* the 2^d, to this day. And he saith that the Clergy by reason of the Canon Laws (not the Common Laws) absented themselves sometimes from such Judgments, and committed their whole Interest for the time to a Lay-Proxie. *Tit. of Honour* 2^d part pag. 704.

Lastly, for the Canon-Law in this point, it is not only dispensed withal by the Kings Summons to his Prelates, but by the Lords themselves in this very Cause of the Earl of *Strafford*; by their examining of the two Arch-Bishops, and a Bishop for Witnesses in the said Cause; which is no less forbidden in the Canon Law, than to Judge in Causes of Blood, *Lyndwood*. Fol. 146. pag. 2.

When the effect of this Paper was opened, and the Records, and all the Books produced by the Bishop of *Lincoln*, who had been in the Tower to search the said Records, the Lords declared and ordered, that they would use no Proxies of their own in this Tryal; with a *Salvo* of their Right against any other time. And thereupon the said Bishop (finding the Inclination of the House, and Timidity of his Brethren) offered the like Declaration, with the like *Salvo*, in point of Right, for the Lords the Bishops, which was accepted of, and entered into the Book, the Bishop of *Lincoln* dictating the same.



T H E

Bishop of Lincoln's A R G U M E N T S,

That Bishops ought not to Vote in Parliament,
With the Answers thereunto.

Arg. I. **B** *Ecause it is a very great hindrance to the Exercise of their Ministerial Function.*

Answer, 1. It is not so much hindrance, as their convening in General Councils, Synods, Convocations, Assemblies, Classes, and the like in all the Churches Reformed or otherwise.

2. It is *propter majus bonum Ecclesiae.*

3. The Apostles unnecessarily put themselves to more hindrances, to work for their livelyhood, *Acts 20. 24. 1 Thes. 2. 9. 2 Thes. 3. 8.*

Arg. II. *Because they do vow and undertake at their Ordination, when they enter into Holy Orders, that they will give themselves wholly to that Vocation.*

Answer, 1. This Vow and undertaking in Ministers Ordination is quite mistaken; the words are in the Bishops exhortation, not in the Ministers Answer.

2. The Bishop hopes they will give themselves wholly to that, and not to any other Trade or Vocation.

3. Wholly, in a Moral, and not in a Mathematical sense that will admit of no Latitude.

Arg. III. *Because Councils and Canons in several Ages do forbid them to meddle in Secular Affairs.*

Answer. 1. Councils and Canons against Bishops Votes in Parliament were never in use in this Kingdom, and therefore

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they are abolished by the Statute of 25 Henry the 8th.

2. So are they by the same Statute, because the Lords have declared, That the Bishops Vote here by the Laws and Statute of this Realm ; And all Canons that Cross with these are there abolished.

3. So are they by the same Statute, as thwarting the Kings Prerogative, to call Bishops by Summons to Vote in Parliament.

4. So are they by the Vote in the House of Commons, 21 Maij. 1641, Because they are not Confirmed by Act of Parliament.

5. This Argument was deserted by Mr. Perpoint, and confessed to be but an *Argumentum ad hominem*.

Arg. III. *Because the twenty four Bishops have a dependancy upon the Arch-Bishops, and because of their Oath of Canonical obedience to them.*

Answer. 1. They have no dependancy upon the Arch-Bishops, but in points of Appeal and Visitation only, and owe them no Obedience but in these two points ; None at all in Parliament, where they are *Pares*, they are equals, and as *Bracton* tells us, *Par in Parem non habet imperium*. What hath Canonical Obedience to do with a Vote in Parliament, declared in this Bill to be no Ecclesiastical but a Secular Affair ?

2. This Argument reacheth not the two Arch-Bishops, discharged in the Rubrick from this Oath, and therefore is no Reason for the passing of this Bill.

Arg. V. *Because they are but for their Lives, and therefore are not fit to have Legislative Power over the Honours, Inheritances, Persons and Liberties of others.*

Ans. 1. Bishops are not for their Lives only, but for their Successors also, in their Land and Honour : As the Earls and Barons also are for their Successors in their Lands and Honours, and holding their Lands in Fee-Simple, may with as good reason Vote in the Honour, Inheritance, Persons and Liberties of others, as others may and do in theirs.

2. Many Peers have been Created for their Lives only, and the Earl of Surrey for the Life of his Father, who yet Voted in this House.

3. The Knights Citizens and Burgeses are chosen for one Parliament only, and yet use their Legislative Power, nor will their being Elected difference their Case ; for the Lords use that Power in a greater eminency, who are not Elected.

4. A Burgeſs that hath a free-hold but for term of Life only, may Vote and aſſent to a Law in Parliament.

5. No ſuch exception ever heard of in the Diets of *Germany*, the *Cortefes* of *Spain*, or the three Eſtates in *France*, where the Prelates Vote in all theſe points with the Nobility and the Commons.

Arg. VI. *Because of Bishops dependancy and expectancy of Translations to places of greater profit.*

Ans^w. 1. This Argument ſuppoſeth all Kings and all Biſhops to be very faulty, if they take the time of their Votes in Parliament from theſe dependancies and expectancies.

2. This may be ſaid of all the Kings great Officers, of all the Noble Members of both Houſes, who may be conceived as well as Biſhops to have their Expectancies, and conſequently to be deprived by this Reaſon of Voting in Parliament.

3. This Argument reacheth not at the two Arch-Biſhops, and ſo falls ſhort of the Votes which are to be taken away by this Bill.

Arg. VII. *That ſeveral Biſhops have of late much encroached upon the Conſciences and properties of the Subjects, and they and their Succeſſors will be much encouraged ſtill to encroach, and the Subjects will be much diſcouraged from Complaining againſt ſuch encroachments, if 26 of that Order be to be Judges upon theſe Complaints. The ſame Reaſon extends to their Legislative Power in any Bill, to paſs for the regulation of their Power, upon any emergent inconveniency by it.*

Ans^w. 1. This Argument fights not againſt Biſhops Votes in Parliament, but againſt their Votes in Convocation, where (if any where) they have encroached upon the Conſciences and Properties of the Subject. Nor yet at the Votes of ſuch Biſhops there as are not guilty of this Offence. Nor need the Subject to be diſcouraged in Complaining againſt the like Grievance, though 26 of that Order continue Judges; for they ſhall not Vote as Judges in their own Cauſe, when they are Legally Charged: And if they ſhould Vote, what were that to the purpoſe, when the Lay-Peers are ſtill four to one? The Biſhops (Aſſiſted with a double Number of Mitred Abbots and Priors) could not hinder the Laws made againſt the Court of *Rome*, the Alien Cardinals and Prelates, the Proviſors, the Suiters to the Popes Conſiſtory under *Edw. 3d*, *Rich. 2d*, and *Hen. 4th*, Much more may thoſe emergent exorbitances of the Eccleſiaſtical

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Jurisdiction be soon curbed and redressed in this inequality of Votes between the Temporal and Spiritual Lords. "So as this Argument doth not so much hurt the Votes, as it quails the Courage of the Bishops, who may justly fear, by this and by the next Argument, that the taking away of their Votes is but a kind of forerunner to the abolishing of their Jurisdiction.

Arg. VIII. Because the whole Number of them is interess'd to maintain the Jurisdiction of Bishops, which hath been found so grievous to the three Kingdoms, that Scotland hath utterly abolished it, and Multitudes in England and Ireland have Petitioned against it.

Ans. 1. This Argument is not against the Vote of Bishops, but against Episcopacy it self, which must be removed because Scotland hath done so, and some in England and Ireland would have it so, and yet peradventure ten times as great a Number as these desire the contrary.

2. There will be found Peers enough in the Upper-House, to reform any thing that is amiss in the Ecclesiastical Jurisdiction, although the twenty six Prelates should be so wicked as to oppose it; as there were found Peers enough in that Noble House to curb the Court of Rome, and the Revenues of the Cardinals under *Edw. 3d*, to meet with the Provisors under *Ric. 2d*, to put all the Clergy into a *Præmunire* under *Hen. 8*, and to Reform the Religion 1^o *Elizabeth*, notwithstanding the Opposition of all the Bishops.

Arg. IX. Because the Bishops being Lords of Parliament, it setteth too great a distance between them and the rest of their Brethren in the Ministry which occasioneth pride in them, discontent in others, and disquiet in the Church.

Ans. This is an Argument from Moral Philosophy which affords no Demonstrations. All are not proud that vote in Parliament, nor discontented that are not so imployed. This Argument fights only against their title of being Lords, which is not the Question at this time.

F I N I S.